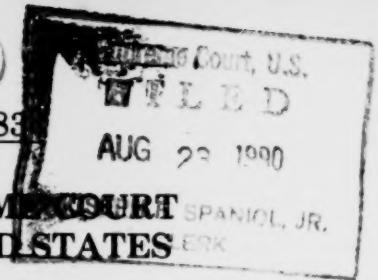


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NO. 89-183

**IN THE SUPREME COURT
OF THE UNITED STATES**



October Term, 1990

D.T., a minor, by his legally appointed guardians;
M.T. and K.T. as parents and legal guardians of D.T.;
F.H., Jr., a minor, by his legally appointed guardians;
F.H. and L.H., as parents and legal guardians of F.H., Jr.;
P.M., a minor, by his legally appointed guardian;
R.T., as parent and legal guardian of P.M.,
Petitioners

vs.

INDEPENDENT SCHOOL DISTRICT NO. I-6
of Pawnee County, Oklahoma,
Respondents

On Writ of Certiorari
to the United States Court of
Appeals for the Tenth Circuit

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

We will become as a nation as we educate our young. It is an awesome responsibility. One in which glaring governmental mistakes should be scrutinized by this Court. The respondent's (school district) Brief In Opposition ignores that responsibility in tone and invites Reply.

The last paragraph of the Brief In Opposition ultimately concludes that the teacher (Epps) who committed these acts "had a deep, dark secret that he kept hidden from the School District" and the deprivations "speak to Epps' criminal cunning not to any conscious indifference . . . on the part of the School District".

In reciting that sexual abuse is hard to detect, the school district has suggested further argument for review by this Court since this presents a glaring contradiction to respondent's own policy of hiring (rely on others) and their formal procedures for investigation and for detection (none). In effect, respondent would offer this Court that while "tragic" nothing can be done even when there is a felony conviction and *they are told of it*.

Petitioners submit the next question (I infra) as an additional reason for granting certiorari. It is offered as an alternative to "duty" (Question I, writ of certiorari), and it is urged that I, infra, is fairly included in petitioner's argument on "policy pursued", Question III, writ of certiorari.

ADDITIONAL REASON FOR GRANTING WRIT

I.

SHOULD THIS COURT DEFINE MINIMUM (WRITTEN) POLICY BY SCHOOL DISTRICTS IN FUNCTIONAL CUSTODY OF CHILDREN TO PREVENT DEFENSELESS VIOLATIONS OF THEIR CONSTITUTIONALLY PROTECTED LIBERTY INTERESTS?

Both sides can agree, if respondent had in place a written screening policy requesting felony information at the time Epps was hired in 1981 and a record check was conducted, there is a substantial chance that Epps would have been exposed. (Respondent has such a policy now.)

Further, when the question was brought forth as to Epps' potential to harm children by phone calls and inquiries in 1981 and 1982, (see Statement of Case, writ of certiorari), respondent had absolutely no professional procedure to investigate them.

Since *Monell vs. Department of Social Services of the City of New York*, 436 U.S. 648 (1978), this Court has balanced its supervision of municipal decision-making policies against the background of not unduly interfering with municipal autonomy. It is suggested that this supervision is needed herein.

The requirements of *Monell* mandate: 1) identifying a policy, or a conscious decision to pursue, or not to pursue, a course of action; 2) attributing fault to the municipality by proving that the policy was deliberately indifferent to constitutional rights; 3) proving that the policy was the cause-in-fact of the deprivations at issue (see II, *infra*); 4) identifying the final policy maker. (This has

been indirectly raised only to this Court, and is dealt with, *infra* III.)

The Brief In Opposition has minimized the inadequacy of the policy present under these facts. Respondent claims the "investigation . . . was both reasonable and thorough." p.8, "Reasonable" and "thorough" relative to what? An investigation without any clearly defined policy will invariably be "reasonable" because the baseline remains fluid. In essence the school district's policy is that, "it goes without saying" that we don't want abuse to occur.

Addressing this Court's latest pronouncement on "policy" and "fault", respondent invokes dicta from *City of Canton vs. Harris*, 489 U.S. ___, 109 S.Ct. 1197 (1989):

"... In virtually every instance where a person has had his or her constitutional rights violated by a city employee, a Section 1983 plaintiff will be able to point to something the city "could have done" to prevent the unfortunate incident."

Brief In Opposition, ppg. 25-26

In *Canton*, the city *had* a policy of medical assistance for incoming prisoners. (Section 334.7). In the present facts the school district did not have any formal procedure to screen felons or investigate notice of abuse. *This is not disputed.*

Further in *Canton*, Justice White noted:

"But it may happen that in light of the duties assigned to specific officers or employees the need for more or different training is so *obvious*, and the inadequacy so likely to result in the violation of constitutional rights, that the policy makers of the city can reasonably be

said to have been deliberately indifferent to the need." (emphasis added), (footnote omitted), 109 S.Ct. at 1202.

The similarity between police departments and school districts in taking physical custody of an individual cannot be overlooked. In sheer numbers, schools exercise physical supervision over forty million children and the need for policies to prevent abuse is "so obvious" as to invoke plenary jurisdiction of this Court in discussing fault in this case.

State legislatures can pass laws empowering school districts to implement policy, but defining minimum policy in constitutional violations is for the courts. This Court took this approach in defining police policy in the use of deadly force in *Tennessee vs. Garner*, 471 U.S. 1 (1985).

With two other documented student abuse incidents resulting in teacher criminal convictions in the Northern District of Oklahoma, the problem is real. Without the Voice of this Court imposing duty or defining minimum policy, many more children will be placed by law in regrettable situations that can be prevented.

To allow school districts to continue to have a policy on abuse that "goes without saying" leaves no procedure to prevent it and no baseline to establish fault when it occurs.

ARGUMENTS IN REPLY

II.

DR. CLAYTON'S ACTUAL NOTICE OF EPPS' SODOMY CONVICTION AND CAUSATION.

Central to petitioners' case and critical to

causation is the following interchange at trial between counsel and Mrs. Diane Kelley concerning her initial phone call to Dr. Clayton on August 11, 1981.

Q. And as a result of a phone conversation that you had what did you tell Dr. Clayton you had discovered about your cousin, Stephen Epps?

A. That he had been arrested in Dallas for a similar incident. (Tr-1-44)

Respondents have continued to offer that Dr. Clayton only was told by Mrs. Kelley that Epps was fired from a teaching position. He was sure of this at trial in 1987, although at deposition in 1985 Dr. Clayton could not even remember Mrs. Kelley's name (Tr-2-118).

In fact, Dr. Clayton was told of the arrest but decided to call Glen Jones, a fellow educator, reasoning that if Epps had been arrested, Jones would know. Petitioners have been unable to find any reported cases where *a conviction was available prior to injury in a custodial situation* and have pursued this case vigorously for that reason.

Respondent counters in its Brief In Opposition at p. 1 that "there is no national clearing house to check for convictions occurring in other states." (Respondent was told that the arrest was in Dallas and it was readily available by contacting Texas law enforcement.)

Respondent indicates that they "relied upon the certification process, and did not specifically make independent inquiries regarding prior arrests or convictions". (Thereby shifting responsibility to another state agency and justifying why they believed Mrs. Kelley's information was incorrect.

Respondent hired Epps and it was their responsibility to comply with state law excluding felon-teachers.)

Respondent asserts at p. 4, Brief In Opposition, that the five other times, in 1981 and 1982, Epps' conduct was "noticed" to the School District that they reduce "to a series of unsubstantiated rumors . . ." (It is submitted that with actual notice of arrest and the abuse of Mrs. Kelley's child, prudence demands a return call to Mrs. Kelley or a felony investigation of Epps.)

The above illustrates respondent's approach of separating each piece of the puzzle to obscure the total picture. In effect by claiming, at best, they, committed errors of omission, respondent asserts that they are not the "moving force" since they didn't do any affirmative act.

Petitioners agree that "inaction" by the State presents problems to this Court in establishing causation but would show that *there is one additional operative fact present herein that is compelling.*

To illustrate, respondent argues at p. 19, Brief In Opposition, *Bowers vs. DeVito*, 686 F.2d 616 (7th Cir. 1982), for the general proposition that simply failing to do anything (inaction) to protect a member of the general public from a dangerous schizophrenic excuses the State from causation.

Petitioners' three children were not members of the general public, but were members of an identifiable class under the school district's immediate control and were forced by State law *into the physical presence of a sick teacher to be victims. As children, they never had a chance.*

This presents quite a different scenerio than *Bowers* and illustrates that action, then inaction, can establish causation and in this case a "snake pit".

III.

RESPONDENT HAS CONCEDED THAT THE SUPERINTENDENT (DR. CLAYTON) WAS THE FINAL POLICY MAKER IN THIS CASE.

The Brief In Opposition at page 13, raises a new matter in *Spann v. Tyler Independent School District*, 876 F.2d 437 (5th Cir. 1989) cert. denied ____U.S.____, 110 S. Ct. 847 (1990).

Spann involved a principal who, unknown to the school board, failed to properly investigate abuse by a school bus driver.

As an *employee*, and not a final policy maker, the Fifth Circuit ruled that this was *respondeat superior* liability and reversed.

In contrast, Dr. Clayton was the admitted final authority to establish policy in the hiring and supervision of Epps. As such, he merges into the entity of the School District and is not merely an employee.

It is uncontested by respondent that Dr. Clayton was a final policy maker, (Tr-3-422), and this distinguishes these facts from *Spann*.

-IV.

RESPONDENT HAS TAKEN LIBERTIES WITH THE FACTS IN THE HEADINGS OF BOTH QUESTIONS PRESENTED I AND II, BRIEF IN OPPOSITION.

The last phrase of respondent's first two

Reasons for Denying Writ states parenthetically: "But did not uncover a ten year old conviction in another state *antedating* the perpetrator's teaching career in both states?" (emphasis added)

In fact, Epps had taught three years in Dallas at Birdy Alexander School (1968-1971), prior to his sodomy conviction, then resumed teaching at Lancaster School in August 1972 until 1977, when he moved to Oklahoma.

Respondent's own employment records indicate this, (Defendant's Exhibit 11, Proof of Teaching Experience, not introduced) and their own witness, Glen Jones, Principal Lancaster School, acknowledged this fact. (Tr-4-500)

Petitioner will not belabor this "mysterious" year absence from teaching at the time of his arrest in August 1971, only to point out that Epps was teaching in Dallas when it occurred and respondent had records of this "gap" when Mrs. Diane Kelley called Dr. Clayton in August 1981 with information on Epps' arrest and firing in Dallas.

While argument of interpretation of factual evidence is appropriate for discussion, to include a *plainly refutable fact in the Questions Presented* suggests the Trail Transcript be certified under Rule 12.5 of this Court prior to decision on this Writ.

V.

**RESPONDENT'S HAVE FAILED TO OFFER
ANY CONTROLLING LEGAL AUTHORITY
OR PERSUASIVE FACTUAL ARGUMENT
ON THE ISSUE OF STATE ACTION.**

The doctrine of state action must be examined on

a case by case basis to determine whether sufficient state contact exists to submit to jury. Respondent surprisingly argues *Sowers vs. Bradford Area School District*, 694 F. Supp. 125 (W.D. Pa. 1988), (further citation omitted), which supports petitioners. (Teacher abuse of school property during the summer.)

Respondent makes the following argument on the facts, Brief In Opposition:

1) It is "irrelevant" that respondent placed Epps in a classroom and gym with authority over the children since the events did not occur in the classroom or during the school year. At p. 17. (Then where does the inquiry of state involvement begin?)

2) "Anyone could have offered to take the children to Tulsa to raise (basketball camp) funds." At p. 11. (Petitioners "trusted" Epps.)

3) "Students often took home materials relating to a myriad of non-school related activities, including volunteer fire department meetings and water board meetings, as an effective means of communication in a small community." At p. 18. (Notices involving basketball relate to school activities and *involve students*.)

Not once in its Brief In Opposition does respondent refer to Epps in the capacity as the children's then basketball coach.

In essence, respondent argues something which is counter-intuitive to these facts, *i.e.*, that a state officer is not a state officer. That Epps is off duty and the parents and children should know this.

Respondent has avoided the off-duty police officer analogy offered by the opinion below for good

reason. These cases are not controlling.

On point is *Stengel vs. Belcher*, 522 F.2d 438 (6th Cir. 1975), *cert. dismissed*, 429 U.S. 118 (1976). Here the court stated at 441:

“The fact that a police officer is on or off duty, or in or out of uniform is not controlling. It is the *nature* of the act performed, not the clothing of the actor or even the status of being on duty, or off duty, which determines whether the officer acted under color of law.”
(emphasis added)

The “nature” of the activity which led to the injuries involved a teacher/coach taking his students/players on a basketball endeavor shortly after the school year.

The issue is an open question for this Court’s review.

CONCLUSION

WHEREFORE, Petitioners have raised a new reason for granting Certiorari in I herein, and pray that a Writ issue and this Court consider the question of preventing abuse of children in the public schools and that the judgment of the Court below be reversed with instructions.

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